THE COURT PRESS, INC.

FILE COPY

Supreme Court of the United States

October Term 1932

No. [redacted] 80

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN W. GRIFFIN,
WHARTON POOR,
Counsel for Respondent.

INDEX.

PAGE

Statement..... 1

I. The causes of action on which petitioner seeks recovery are governed by German law and petitoner shows no right to recover under that law..... 5

II. The *Isis* was fit for the trip from Bremen to Hamburg..... 9

III. Even if it be assumed that the *Isis* was unseaworthy on sailing from Bremen, the petitioner could not recover..... 13

(1) Seaworthiness on sailing from the loading ports satisfies both the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause..... 13

(2) If the vessel is seaworthy on sailing, her owners are not liable for faults or errors in management or navigation, making the vessel unseaworthy at sea, at ports of call, or at the port of discharge. 14

(3) When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the navigation or management of the vessel for which the shipowner is not liable..... 15

(4) When the fault or error (if it existed) was not the cause of the loss, it is perfectly obvious that it must be disregarded..... 16

PAGE

(5) Alleged "intervention" of respondent... 16

(6) Petitioner's authorities..... 18

IV. Causal connection under the Harter Act..... 20

V. The petition for a writ of certiorari should be denied..... 24

TABLE OF CASES.

Atchison, etc. Ry. Co. v. Calhoun, 213 U. S. 1..... 16

Bank of California v. International Mercantile Marine Co., 64 Fed. (2d) 97..... 8
Bradford Electric Light Co. v. Clapper, 286 U. S. 145.... 7
Brick v. Long Island R. R. Co., 245 N. Y. 222..... 11

Caledonia, The, 157 U. S. 124..... 13
Carisbrook, The, 247 Fed. 583..... 14
Charter Shipping Co. v. Bowring, 281 U. S. 515..... 6
Cuba Railroad Co. v. Crosby, 222 U. S. 473..... 7

East River Co., In re, 266 U. S. 355..... 18

Guadaloupe, The, 92 Fed. 670.....15, 17

Hartford & N. Y. Tr. Co. v. Rogers & Hubbard, 47 Fed. (2d) 189, 283 U. S. 835..... 23
Holy Trinity Church v. United States, 143 U. S. 457.... 21

Indrani, The, 177 Fed. 941..... 15
International Navigation Co. v. Farr, 181 U. S. 218...14, 18

Jason, The, 225 U. S. 32..... 5
Jay Wai Nam v. Anglo-Am. Co., 202 Fed. 822..... 15

PAGE

McCaldin v. Cargo of Lumber, 198 Fed. 328, affd. 202 Fed. 735. 11
Malcolm Baxter, Jr., 277 U. S. 233. . . . . 22, 23
Milwaukee Bridge, The, 26 Fed. (2d) 327. . . . . 15, 17

Newport, The, 7 Fed. (2d) 452. 14

Oritani, The, 40 Fed. (2d) 522, affd. 54 Fed. (2d) 1075. . 14

Silvia, The, 171 U. S. 462. 14
Smyrna, The, 62 Fed. (2d) 1048. 11
Standard Oil Co. v. United States, 221 U. S. 1. 21
Steel Navigator, The, 23 Fed. (2d) 590. . . . . 14, 15, 21
Styria, The, 186 U. S. 1. 16

Thessaloniki, The, 267 Fed. 67. 22
Titania, The, 19 Fed. 101. 11
Turret Crown, The, 282 Fed. 354; 284 Fed. 439. 22

United States v. N. Y. & O. S. S. Co., 216 Fed. 61. . . . . 15, 17

Valentine, The, 131 Fed. 322. 20

Waalhaven, The, 36 Fed. (2d) 1706. 20
Wildcroft, The, 201 U. S. 378. 15
Willdomino, The, 300 Fed. 5, affd. 272 U. S. 718. . . . . 18, 19

TEXT BOOKS.

Carver, Carriage by Sea, 7th Ed. 11, 13, 15

STATUTES.

Fire Statute, R. S. 4282. 18
General Limitation Statute, R. S. 4283. 18
Harter Act (Feb. 13, 1893). 13-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 983.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,
Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,
Respondent.

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

The libelant, as assignee of cargo owners, sued to recover back sums deposited with the respondent to secure general average contributions. The libel alleged that these deposits were obtained by duress (Record, p. 7), but no proof of duress was offered. Concededly, the deposits were made in accordance with the usual maritime practice.

Some further statement of the facts and some correction of the petitioner's statement seem necessary to a right understanding of the case.

In December, 1927, the respondent's cargo steamer *Isis* loaded, at certain Pacific Coast ports, cargo destined for Bremen, Hamburg and other ports.

When the *Isis* sailed from her loading ports, she was seaworthy, and properly manned, equipped and supplied. Both the District Court (p. 690) and the Circuit Court of Appeals (pp. 706, 707, 710) so found; and the petitioner admits it (Petition, p. 2).

Therefore, on sailing, the *Isis* and the respondent had fully complied with the Harter Act and with the Jason clause of the bill of lading (see authorities, *infra,* pp. 13, 14).

Just before the *Isis* arrived at Bremen, and while she was proceeding up the Weser, she stranded and twisted her rudder stock about 45°, with the result that, when the vessel's helm was put amidships, her rudder was over to starboard. This was the only damage suffered. With the assistance of tugs, the *Isis* reached Bremen without further incident and there discharged the cargo destined for that port. The petitioner makes no claim with respect to this occurrence, saying (Petition, p. 3):

> "Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding."

When the *Isis* had discharged her Bremen cargo the practical situation was this:

It would have been possible to put the *Isis* into dry dock and to make permanent repairs. This would have required about two weeks' time (Record, p. 211), and necessitated handling the greater part of the several thousands of tons of cargo, destined for Hamburg and other ports, which was still on board. This cargo would have had to be discharged, stored, insured and reloaded (Record, p. 217). The expense of all this would have constituted a general average charge on ship and cargo; and, because of the relative values of ship and cargo, four-fifths of the expense would have fallen on the cargo.

The only suitable dry dock was already engaged for an indefinite period (p. 217). Therefore several weeks' delay would have been involved.

The other alternative was to send the ship on the short run from Bremen to Hamburg with her rudder lashed amidships and with the assistance of tugs for steering purposes.

Before any decision was reached, the vessel's rudder blade was examined by a diver, who made four descents (p. 118) and reported that it was in good condition. In order to make this certain, the *Isis* was placed in a dry dock which was available for a few hours for purposes of examination, though not for the much longer time needed for repairs. Since she still had a large quantity of cargo on board, the water could not be pumped completely out of the dry dock, and about one-quarter of the rudder blade (3 to 4 feet) remained submerged. In this situation, she was examined (not at night, as stated by the petitioner, but between 5 and 6 P. M.), not only by her master, but by four other surveyors, including the respondent's marine superintendent, an inspector and two repair men, who went in a small boat close up to her rudder. Down to the water line the rudder was, of course, visible throughout. They examined the small part below the water with a light and also by hand and by applying to the rudder blade a straight edge, which is the standard method of test (p. 368). Not the slightest bending of the rudder blade was discovered.

The surveyors recommended that the vessel proceed to Hamburg with her rudder lashed and with tugs to assist in her steering. She had, of course, the full power of her engines available, and she had twin screws, which gave considerable steering capacity. She had tugs which, the experts' evidence showed, gave her, at moderate speeds, greater steering capacity than her rudder would have done (Davis, p. 495; Huseby, pp. 525, 526; Krueger, p. 104; Commissioner's Report, pp. 656, 657).

In addition, the respondent consulted the head surveyor of Germanischer Lloyds, the German Classification Society, who approved her proceeding in this manner. The petitioner states that no certificate of seaworthiness was obtained. It is true that none was actually signed that evening, owing to the lateness of the hour, but the surveyor in question, upon

a statement of the case to him, did in fact give his approval of the fitness of the ship to proceed under the circumstances stated, and subsequently gave a certificate to that effect (Exhibit 5, p. 617).

Besides all this, those underwriters who were within reach were consulted, namely, the Hamburg Underwriters Association, whose members insured all of the hull and a considerable part of the cargo (pp. 310, 181). They also approved, provided that the vessel had two tugs (p. 181).

The rudder was accordingly lashed amidships and not two, but three, tugs were engaged. These tugs were very powerful, aggregating 2,690 horsepower, more than that of the engines of the *Isis* herself (p. 89).

The *Isis* started down the river at about 1.30 A. M., under the direction of a river pilot, with the three tugs and, of course, the use of her own engines and twin screws. The chief pilot recommended starting at this hour because the tide was right and traffic at a minimum (p. 205). The river was abundantly lighted on both banks (p. 272), and it was a clear moonlight night.

It will be seen from the foregoing that the petitioner's assumption that the respondent knowingly sent out an unseaworthy ship is quite erroneous. In fact, the ship was entirely fit for the trip (pp. 9-12, *infra*), and the decision to send her and thereby to save the general average expenses, which would have fallen chiefly on cargo, and to avoid a long delay, was made after an unusually careful examination and after approval had been secured from the surveyors, from the chief surveyor of Germanischer Lloyds and from all of the underwriters who could be reached. There was certainly no lack of diligence.

The reason for the decision was "to save time and to save expenses and to do the best for everybody" (Reichenbacher, p. 218); "to save the cost of discharging the cargo, storing and reloading it, and in order to avoid the cargo being damaged by those manipulations" (Warns, p. 309). It was a decision made for the benefit of all the interests involved (Brandt, p. 185).

The vessel proceeded without difficulty for about an hour and forty minutes (pp. 105, 602), covering some 16 kilometers and rounding, without the slightest difficulty, bends in the river both to right and to left.

Just before she reached the point where the River Lesum enters the Weser, she sighted another steamer upbound. In order to pass, the pilot altered the course of the *Isis* to starboard and brought his vessel unnecessarily close to the starboard bank of the river. The result was, as the experts testified and the Courts below found, that she smelt the bank, and consequently swung to starboard. This in turn exposed her port bow to the flood tide, which was setting up the river, and that increased the starboard swing, with the result that she ran aground. General average expenses were incurred, in floating her, bringing her back to port, handling cargo, etc., to secure which the deposits now in suit were made.

This accident was due to an error in navigation on the part of the pilot, as was found by the Commissioner and by both the Courts below; and therefore, by the terms of the Jason clause (quoted p. 708 of the record), the shipowner is entitled to general average contribution. *The Jason*, 225 U. S. 32.

I.

The causes of action on which petitioner seeks recovery are governed by German law and petitioner shows no right to recover under that law.

At pages 15 and 16 of the petition, the petitioner states that his right to recover general average deposits was "dependent upon the same principles which would govern his right to recover damage to the cargo."

This is incorrect. The petitioner is not suing for damage to cargo, but to recover deposits which his assignors made as security for any contributions which might be found due by them in an adjustment of general average. And it is well settled, of course, that in such a case the law governing is

that of Germany (the law of the port of destination and, incidentally, the jurisdiction in which the accident happened) and the petitioner has not shown any right to recover under that law.*

In *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, suit, as here, was brought against shipowners to recover a general average deposit made in London, the voyage involved being from Gulf and Atlantic ports to London. This Court held that the right of the shipowner to contribution in general average, and hence the right of the cargo owner to the recovery of the deposit, was governed by English law, and that the District Court correctly exercised its discretion in refusing to take jurisdiction, the parties to the suit being aliens. As to the law governing, this Court said (pp. 517, 518):

> "As that liability" [in general average] "arises not from contract but from participation in the common venture, see *Hobson* v. *Lord*, 92 U. S. 397; *Barnard* v. *Adams*, 10 How. 270, 303; *The Roanoke*, 59 Fed. 161, 163; *Milburn* v. *Jamaica Fruit &c. Co.* (1900), 2 Q. B. 540, 550, its extent in the absence of such limiting clauses" [the Jason clause, etc.] "is, under the admiralty rule, fixed by the law of the port of destination. *Hobson* v. *Lord, supra*, 411; *Mousen* v. *Amsinck*, 166 Fed. 817, 820; *Compagnie Francaise de Navigation a vapeur* v. *Bonnase*, 15 F. (2d) 202, 203; Congdon, General Average (2d Ed.) 148. Even if so limited, the extent and effect of the limitation cannot be determined apart from consideration of the rule limited."

In the case at bar, the bills of lading incorporate the so-called Jason clause and provide that the carrier shall be entitled to avail itself of the Harter Act, except the bills for a small quantity of cargo shipped at Punta Arenas, and those contain a clause equivalent to the Jason clause (pp. 709, 710). Subject to possible qualification by reason of those bill of lading clauses, the German law governs and creates the right of action, if any.

---

* Some small portions of the cargo were destined ultimately for Antwerp and for London. This obviously does not affect the legal situation, save that the laws of Belgium and of England, as well as those of Germany, might have to be considered.

Since German law determines the petitioner's right to recover, questions of so-called public policy are not involved. If the petitioner cannot recover these deposits under German law, our courts will not create a right of action for his benefit, when none existed *ab initio*. As said by this Court in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, at 160:

> "A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done. Compare *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 550, 551; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389; *Royal Arcanum* v. *Green*, 237 U. S. 531. See also *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542; *Atchison, T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 69."

The burden of proving that he has a cause of action under German law rests, of course, upon the petitioner; and he has not sustained that burden. There is neither allegation nor proof on the subject.

In *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, where the plaintiff sought to enforce a cause of action arising under the law of Cuba, this Court, per Mr. Justice Holmes, said (p. 478):

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done

and the parties are at the time of doing it. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. See *Bean* v. *Morris*, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights."

And at page 479:

> "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it."

In *Bank of California* v. *International Mercantile Marine Co.*, 64 Fed. (2d) 97 (C. C. A., 2nd Cir.), the steamship company, a common carrier, misdelivered certain goods consigned to the plaintiff at Hamburg. The defense to the action was that, under the bills of lading and as a condition of recovery, notice of loss was required to be given within a limited period. This condition was not complied with.

In holding that no recovery could be had, the Court said (p. 98):

> "The question therefore is whether the claim, since the misdelivery of the goods creating the claim was in Germany, is lost by the failure to give notice of claim as required by the bill of lading and whether the appellant is released, by reason of this agreement, from paying damages for the loss of the salmon. This liability depends upon the law of Germany. Louis-Dreyfus v. Paterson S. S. Co., 43 F. (2d) 824 (C. C. A. 2). German law is also determinative of the question of whether the cargo owner was excused by the conduct of the carrier in misdelivery from service of the notice of claim under the terms of the bill of lading. The place of performance of the obligation to be excused, that is, notice of claim, is the same as the place of the acts alleged to constitute the excuse, that is, misdelivery, and is governed by the law of the place of performance. Coghlan v. South Carolina R. R. Co., 142 U. S. 101, 111; Scudder v. Union Natl. Bank, 91 U. S. 408, 413; Louis-Dreyfus v. Paterson, supra; Wharton on Conflict of Laws (3d Ed.), §427, pp. 929, 930.

> The appellee did not offer any proof of the German law supporting the claim that a misdelivery excused the giving of notice of claim or the performance of any of the other terms of the bill of lading. In the absence of such proof, we may not indulge in the assumption that such is the German law. Gerli & Co. v. Cunard S. S. Co., 48 F. (2d) 115, 117 (C. C. A. 2). We may assume that the notice of claim and limitation of liability clauses in the bill of lading are in full effect."

II.

The *Isis* was fit for the trip from Bremen to Hamburg.

The petitioner frequently refers to the *Isis* as unseaworthy. In fact, she was found to be seaworthy. By consent of the parties, the issues were referred to Mark W. Maclay, Esq., an experienced member of the admiralty bar, as Special Commissioner. After hearings and argument he filed a very full report (Record, pp. 624-674), to which he annexed findings of fact and conclusions of law—among others that the *Isis* "was seaworthy for the intended voyage" (from Bremen to Hamburg) "in tow of the tugs described with her rudder lashed amidships" (p. 672). The petitioner's exception to this finding was overruled by the District Court (pp. 687, 688), which approved the finding. This agrees with the finding made by the German Seeamt, or Court of Inquiry, whose report was offered in evidence by the petitioner and which found (p. 593):

> "There should have been no hesitation in starting the voyage with a vessel so equipped and aided."

It is not believed that the Circuit Court of Appeals took a different view. While the opinion does refer to the vessel as "crippled" and as "unseaworthy," it is evident that, in those parts of the opinion, the Court is considering the vessel *per se* and unaided by tugs. The Court does not criticize or overrule the concurrent finding of the Commissioner and of the District Court that the vessel, assisted by tugs, was

fit for the trip? On the contrary, the Circuit Court of Appeals said (pp. 711, 712):

> "Was the ship seaworthy when it left for Hamburg? Seaworthiness, a relative term, depends upon the circumstances surrounding each undertaking. A vessel under tow may be regarded as seaworthy if the tugs are powerful enough to tow the vessel, even though she is not navigated under her own power.*
>
> * * * The captain and mate of the vessel and the captain of the towboats testified that there was no difficulty experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, and in so doing they navigated through several bends in the channel in both directions. * * * If there were a bend in the rudder, the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. As the vessel proceeded before the stranding, the three tugs were found below to have been going full speed ahead. But, as found below, the power of the vessel and her tugs was employed to correct any tendency to sheer, which would affect the navigation or control of the vessel."

And at page 710 the Circuit Court of Appeals said:

> "The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

The petition does not assert that the *Isis* was unseaworthy, except in that

> "her rudder * * * was bent so that, even with the rudder lashed amidships her course would be erratic and she could not make such a voyage safely while being steered by tugs" (Petition, p. 3).

Criticism is also made because she sailed at night (Petition, p. 3).

The petitioner's charges are easily answered:

(1) The rudder blade was not bent when the vessel sailed from Bremen. This is shown by the examination made by

---

* The *Isis* was in fact navigated under her own power.

the diver and by the subsequent examination made in dry dock. After the vessel returned, following the *second* stranding, a very slight deflection of the tip of the rudder blade was found, amounting only to 5°. It is altogether probable that this was done at the time when her stern struck bottom just before she stranded the second time (pp. 95, 108, 137).

(2) The deflection in question was not of the slightest practical consequence. The evidence of the experts (pp. 502, 557) showed that, before the steering of the vessel would be substantially affected, the whole of her rudder blade would have to be bent nearly, if not quite, 10° (pp. 481, 557). The deflection in question, which was observed only after the *second* stranding, affected only about 20% of the rudder's surface, amounting to a maximum of 5° at the extreme tip and diminishing to zero about halfway up and halfway forward (pp. 298, 306). Over this 20% there was, therefore, an average deflection of 2½°. This is equivalent to a deflection of the entire rudder blade to the extent of *one-half of 1°*, a microscopic figure, wholly without the smallest possibility of practical effect.

It was found by the Special Commissioner (p. 657), by the District Court (pp. 687, 688) and by the Circuit Court of Appeals (p. 713) that, even if the deflection in question had existed when the *Isis* left Bremen, it could have had no effect upon her steering. The expert testimony appears at pages 469, 477, 502 and 555. As the Courts below point out, this is confirmed by the fact that there was no trouble in handling the ship from the time she left Bremen until the scene of the accident was reached (pp. 102, 331).

(3) If the deflection existed, it was, therefore, wholly immaterial, and an immaterial defect does not make a vessel unseaworthy.

The Smyrna, 62 Fed. (2d) 1048; C. C. A., 4th Cir.;
McCaldin v. *Cargo of Lumber*, 198 Fed. 328, affirmed 202 Fed. 735; C. C. A., 3rd Cir.;
The Titania, 19 Fed. 101, 107;
Carver, Carriage by Sea, 7th Ed., Sec. 17;
Brick v. *Long Island R. R.*, 245 N. Y. 222.

(4) It can hardly be claimed that sailing at night constituted unseaworthiness. As already pointed out, the river was well lighted, the weather fine, the tide right, and traffic at a minimum, and the time of departure was fixed in accordance with the opinion of the chief pilot of the port of Bremen.

As regards the fitness of the vessel, therefore, after the most thorough examination possible, she was considered by all of those who were consulted, including underwriters, to be fit to proceed. It was good judgment to have her proceed rather than to incur the long delay and the certainty of heavy general average expenses that a different course would have involved. In fact, the only effect of the accident at the Lesum was to subject the cargo to general average charges similar to those which would have been incurred if she had been repaired at Bremen. This demonstrates the triviality of the complaint made. The Commissioner and the District Court, as well as the German Tribunal, specifically found her fit to proceed, and the opinion of the Circuit Court of Appeals, when rightly understood, is not to a different effect.

Therefore the whole basis of the petitioner's argument fails. The petition practically charges the respondent with having, for its own convenience and quite recklessly, sent out a vessel known to be unseaworthy. In fact, she sailed only after careful examination and with the unanimous approval of everyone, in order to save delay and expense, which would have fallen chiefly on the cargo.

These being the facts, it is submitted that the questions of law stated in the petitioner's brief do not arise. Not only is it improbable that the minute deflection of the rudder blade was present when the *Isis* left Bremen, but it is certain that, if it were present, it did not affect her fitness nor her navigation, and it is equally certain, as found by the Commissioner and by both Courts below, that it had nothing to do with the accident, but that the accident was the result of negligent navigation on the part of the pilot.

III.

Even if it be assumed that the *Isis* was unseaworthy on sailing from Bremen, the petitioner could not recover.

The petitioner considers (Petition, pp. 15, 16) that this case depends upon the same principles as would a suit for damage to cargo. This may be assumed for purposes of the argument under this point.

(1) *Seaworthiness on sailing from the loading ports satisfies both the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause.*

In *The Caledonia*, 157 U. S. 124, this Court, quoting from an opinion of Mr. Justice Brown, when Circuit Judge, said (p. 133):

> "The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point *up to which the warranty of seaworthiness extends.*" (Italics ours.)

In *Carver on Carriage by Sea*, 7th Ed., Sec. 21, it is said:

> "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one; viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing.
>
> On the other hand, there is no undertaking that she will continue fit after sailing. If from any cause she afterwards becomes unseaworthy, and this leads to loss, the shipowner is only liable if the cause was one for which he was answerable."

That this is the rule with respect to the Harter Act is, of course, elementary.

In *International Navigation Co.* v. *Farr*, 181 U. S. 218, this Court, in speaking of the obligation under the Harter Act to make the ship seaworthy, said (p. 225):

> "* * * that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment *before* the commencement of the voyage and *until it is actually commenced.*"

And at page 226:

> "The obligation was to use diligence to make her seaworthy *before she started on her voyage,* * * *."

In The Steel Navigator, 23 Fed. (2d) 590; C. C. A., 2nd Cir., the Court said (pp. 591, 592):

> "The covenant of seaworthiness is to be determined when the ship breaks ground and only then. * * * Especially is it necessary to remember that the measure of what can in any event be demanded of her is her fitness for the whole voyage as contemplated at the outset. Adjustments made necessary by subsequent events pertain to her management, and cannot touch her seaworthiness."

The Newport, 7 Fed. (2d) 452, 454; C. C. A., 9th Cir.;

The Oritani, 40 Fed. (2d) 522, affd. 54 Fed. (2d) 1075; C. C. A., 3rd Cir.

(2) *If the vessel is seaworthy on sailing, her owners are not liable for faults or errors in management or navigation, making the vessel unseaworthy at sea, at ports of call, or at the port of discharge.*

(a) *At sea:*

The Silvia, 171 U. S. 462, where the crew failed to close iron shutters, resulting in damage to cargo by sea water;

The Carisbrook, 247 Fed. 583; C. C. A., 1st Cir.

(b) *At ports of call:*

The Steel Navigator, 23 Fed. (2d) 590; C. C. A., 2nd Cir.;
Jay Wai Nam v. *Anglo-Am. Co.*, 202 Fed. 822; C. C. A., 9th Cir.;
The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, 216 Fed. 61; C. C. A., 2nd Cir.;
The Milwaukee Bridge, 26 Fed. (2d) 327; C. C. A., 2nd Cir.

(c) *At ports of discharge:*

The Wildcroft, 201 U. S. 378;
The Indrani, 177 Fed. 941; C. C. A., 2nd Cir.

(3) *When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the navigation or management of the vessel for which the shipowner is not liable.*

The above proposition is directly supported by the decisions in

The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, C. C. A., 2nd Cir.; 216 Fed. 61;
The Milwaukee Bridge, C. C. A., 2nd Cir.; 26 Fed. (2d) 327.

Those decisions are correct in principle, and there is no decision in any other circuit at variance with them. They govern the case at bar.

From what has been said, it is beyond question (1) that the statutory duty as to seaworthiness enjoined by the Harter Act is completely fulfilled if the ship is seaworthy when she leaves her loading port; (2) that if she subsequently becomes unseaworthy, at sea or in a port of call, that fact does not deprive her of the protection of the Harter Act.

(4) *When the fault or error (if it existed) was not the cause of the loss, it is perfectly obvious that it must be disregarded.*

Atchison etc. Ry. Co. v. *Calhoun*, 213 U. S. 1.
See discussion, p. 23.

(5) *Alleged "intervention" of respondent.*

The petition (p. 10) states that the second question presented is—

> "Where a shipowner *intervenes* and *personally orders* a vessel to sail from an intermediate port *knowing her to be unseaworthy*, can he obtain exemption under the third section of the Harter Act by virtue of his previous compliance with that Act at the original port of shipment?" (Italics ours.)

The discussion already had shown that the underlying assumptions of this question are entirely erroneous in fact.

At page 31 of the petition is advanced the proposition that "where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call, and * * * causes her to sail in an unseaworthy condition, he can obtain no exemption under section 3 of the Harter Act." It cannot fairly be said in the present case that the shipowner "intervened" and personally ordered the *Isis* to sail. All that the respondent did was to have its marine superintendent hold a survey and consult with the master. There was no "intervention" in any improper sense. The captain was not overruled, as the petitioner seems to imply. It was the opinion of all the practical men at Bremen, including the captain (pp. 89, 90), that it was proper for the *Isis* to proceed with her rudder lashed and with the assistance of three powerful tugs. As already stated, the Courts below and the German Tribunal found her in fact fit. Certainly it should be the policy of the law to encourage a shipowner to assist the master, rather than to condemn his assistance as intervention. In *The Styria*, 186 U. S. 1, an Austrian vessel, just after the outbreak of the Spanish-American War, had loaded sulphur at an Italian port for delivery in the United States.

Believing that sulphur had been declared contraband by Spain, the master relanded it and sailed. When his vessel arrived in the United States she was sued by the owners of the sulphur, who alleged that, in relanding it, the master had failed properly to exercise his discretion, and had merely blindly followed his owner's positive orders. In rejecting this contention this Court said (p. 20):

> "Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. * * * So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. In the case of *Nobel's Explosives Co.* v. *Jenkins* (L. R. 1896, 2 Q. B. 326), just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners,* if it were possible to get it before the emergency was over; and all that can be said is, that there was a *concurrence of judgment* between the ship agents and the master as to what was the proper course to pursue." (Italics ours.)

That was precisely the situation here; the master and the marine superintendent consulted and concurred in judgment.

No one disputes that, if the decision in the present case had been made by the master without any consultation, the exemptions of the Harter Act would have applied.

The Guadaloupe, 92 Fed. 670;
United States v. *N. Y. & Q. S. S. Co.*, C. C. A., 2nd Cir.; 216 Fed. 61, 71, 72;
The Milwaukee Bridge, C. C. A., 2nd; 26 Fed. (2d) 327.

It follows that the duty of taking such measures at an intermediate port does not fall within the requirements of the Harter Act; for, if it did, it would be a non-delegable duty and negligence even of the master would destroy the owner's defense under the Harter Act. Such matters are matters of management, and their *nature* is not changed by the fact that they are performed by one person or by another. As was said by this Court in *International Co.* v. *Farr,* 181 U. S. 218, at 226, in speaking of the Harter Act:

> "* * * The law recognizes no distinction founded on the character of the servants employed. * * *"

Section 3 of the Harter Act provides that, if the owner shall have exercised due diligence, etc.; he shall not be liable for faults or errors in management or navigation. The petitioner seeks to add to the Act the further proviso, "* * * unless the fault or error is that of the owner's marine superintendent." But there is no such qualification. The exemption is complete. It would be judicial legislation to insert such an exemption, especially as the Harter Act does make certain specific requirements of the owners. To add others is quite beyond the functions of the Court (*In re East River Co.,* 266 U. S. 355).

On the other hand, the Fire Statute, R. S. 4282, and the General Limitation Act, R. S. 4283, do distinguish between the acts of the owner and those of his employees. While, therefore, Congress has specifically provided in those two statutes that the owner is not entitled to their benefit, if personally at fault, there is no similar proviso in the Harter Act as regards anything happening after the ship has sailed from her loading port.

(6) *Petitioner's authorities.*

The cases relied on by the petitioner are quite different in their facts and are not in conflict with the foregoing.

In particular, the petitioner claims that *The Willdomino,* 300 Fed. 5 (C. C. A., 3rd Cir.), affirmed 272 U. S. 718, is in conflict with the decision below. But the distinction is very plain.

The *Willdomino* was a case of a "voyage in stages," i. e., it was a case where the Court applied the rule that, if a vessel is to proceed from her loading port to a port of call, and thence to her destination, she need not, at first setting out, be seaworthy for the *entire* voyage, but only for the first stage, *provided, however,* that at her port of call she is made seaworthy for the balance of the voyage; but, if this is not done, she is unseaworthy *ab initio* (*Carver, Carriage by Sea,* 7th Ed., Sec. 19-b). In the *Willdomino* the vessel sailed from Messina for New York, via Gibraltar and Lisbon. On leaving Messina she had not enough coal to take her to New York, and that deficiency was not remedied at the ports of call. She left Lisbon for New York with insufficient coal. Consequently she was forced to deviate to Nova Scotia and there stranded. Clearly she never complied with the Harter Act at all; for she did not remedy her deficiency at the ports of call and was therefore unseaworthy *ab initio.* The Circuit Court of Appeals in the present case was absolutely correct in saying that "in the Willdomino case, the fault arose at the inception of the voyage."

In the Circuit Court of Appeals for the Third Circuit the *Willdomino* was decided (1) on the ground that the vessel was unseaworthy; (2) on the ground that she deviated. This Court affirmed on the ground of deviation, without considering the other point.

The wide difference between the *Willdomino* and the present case is shown by the fact that, while the *Willdomino* was unseaworthy as to coal supply at *all* her loading ports, the *Isis* was *admittedly seaworthy* at those ports. The *Willdomino* was only *conditionally* seaworthy on sailing from Messina, i. e., if she loaded sufficient bunkers at the ports of call to see her through. But, when her owners failed to perform this obligation, she was unseaworthy *from the beginning.* Therefore she did not fulfill her warranty of seaworthiness, nor did she comply with the Harter Act. Neither the decision of the Circuit Court of Appeals nor that of this Court is relevant in the case at bar.

The Waalhaven, 36 Fed. (2d) 1706, was a case of deviation, and clearly not in point here. The Court, however, recognizes the rule that damage not proximately resulting from unseaworthiness is to be disregarded, saying:

> "We regard the damage suffered in Cabot Strait as not a proximate result of her unseaworthiness. The Malcolm Baxter, Jr., 277 U. S. 323."

In *The Valentine,* 131 Fed. 322 (a District Court decision), where the cargo of a steam lighter was damaged because the lighter was sunk at her pier by ice, while her officers were ashore, her fires banked and her pumps not working, the Court decided against the owners on the ground of initial unseaworthiness or rather of improper manning. The owners of the vessel knew from the beginning that the captain and engineer would go ashore, and that all equipment for avoiding injury would be useless. The Court said:

> "* * * if the owners approve, suffer or connive at such custom or practice, such vessel is not properly manned."

The Court further said:

> "The loss in the present case arose from fault in the management of the vessel at Pier 42 (where she was tied up), *but the fault was not initiated there.*" (Italics ours.)

These cases have no bearing on the present situation.

IV.

Causal connection under the Harter Act.

The petitioner finally suggests that the case involves the question of whether, if the vessel is unseaworthy in some detail, the protection of the Harter Act is forfeited, although that unseaworthiness has nothing to do with the disaster. However interesting that question may be, it does not arise in the present case. The vessel was seaworthy throughout

when she left her loading ports, and, as was said in *The Steel Navigator*, C. C. A., 2nd Cir.; 23 Fed. (2d) 591, 592:

> "The covenant of seaworthiness is to be determined when the ship breaks ground and only then. * * * Adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness."

The question is in reality this: If a vessel sails from her loading ports having fully complied with the Harter Act, and if, at an intermediate port, her master, after consultation with the owner's marine superintendent, does some act which technically affects her seaworthiness, manning or equipment (such as removing her radio set, withdrawing a man from her crew, or permitting her to proceed with some slack rivets in her deck), and if thereafter she is struck by lightning or strands through the negligent navigation of her master, is the protection of the Harter Act destroyed by the technical unseaworthiness, in spite of the fact that she was entirely seaworthy at the only time when the Harter Act required her to be so, and in spite of the fact that the subsequent technical unseaworthiness had not the remotest connection with the disaster? To state the question is to answer it.

It should, nevertheless, be pointed out that the Harter Act, like other statutes, must be construed reasonably, and not so as to produce an absurd result.

> *Holy Trinity Church* v. *United States*, 143 U. S. 457;
> *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The Special Commissioner expressed it well when he said (pp. 651, 652):

> "Dictates of convenience as well as reasonable and fair construction are opposed to a rule which, if followed to its logical conclusion, would require the shipowner, in case of damage to cargo by unseaworthiness of a plate in the No. 1 hold or in case of a general average sacrifice due to admittedly negligent navigation, to show that the vessel was seaworthy not only

> in respect of her No. 1 plating in the one case or of her navigating equipment in the other case, but also in respect of every single part of hull and machinery and of deck, engine-room and steward's equipment, or that due diligence had been exercised in that behalf. The possibility of permitting the shipowner to escape from a liability for, or to recover a general average contribution in spite of, some point of seaworthiness, which never results in any damage to anyone, is surely neither unjust nor fraught with any practical danger."

If the rule contended for by the libelants were correct, then, in every case where the Harter Act is pleaded as a defense, it would not be enough to prove that the ship was seaworthy in respect to everything connected with the disaster, but the shipowner would have to show that he had what does not exist—a ship perfect in every detail of design, construction, manning, equipment and supply. If the cargo, by meticulous cross-examination, could show that there was any particular, no matter how utterly unconnected with the disaster, in which the ship, her manning or her supply, was open to criticism, the defense of the Harter Act would be invalidated. Indeed, the burden would be on the shipowner to show that every conceivable detail was perfect, or that due diligence had been used. As a practical matter, such proof could never be given about any ship.

Surely no such preposterous result was intended by Congress or would be sustained by the Courts. The phrase "in all respects" in the Act means, of course, in all respects material to the case. It does not mean that there is to be a contest of wits between the parties as to whether the cargo interests can find any detail, wholly unconnected with the accident, which may be open to some criticism.

In this connection, it may be remarked that, in the *Malcolm Baxter, Jr.*, 277 U. S. 323, this Court cited with approval the following Harter Act cases which hold that unseaworthiness having no relation to the disaster is not material.

> *The Turret Crown*, 282 Fed. 354;
> *The Thessaloniki*, 267 Fed. 67; C. C. A., 2nd Cir;
> *The Turret Crown*, 284 Fed. 439, at 444, 445; C. C. A., 4th Cir.

In *Hartford & N. Y. Tr. Co.* v. *Rogers & Hubbard*, 47 Fed. (2d) 189, 192, the Circuit Court of Appeals for the Second Circuit squarely held that, if unseaworthiness had no connection with the accident, it was immaterial under the Harter Act. This Court declined to grant a writ of certiorari to review that question (283 U. S. 835).

The petitioner's whole contention rests on confusion of thought. The answer may be stated as follows:

It is too well settled for argument that the requirement of due diligence under the Harter Act speaks as of the time when the vessel breaks ground on her voyage; at that time it is either satisfied or not satisfied. In this case it was satisfied, and the shipowner was therefore entitled to the immunities given by the Harter Act. Assuming, for the sake of argument, that even respondent itself made an error of judgment or was guilty of negligence, in sending the *Isis* out from Bremen with the assistance of tugs, then either (1) that error was excused by the terms of the Harter Act as an error in management; or (2), if not excused, it would give rise merely to an independent claim for any damages caused by that error; and, since the Special Commissioner, the District Court and the Circuit Court of Appeals have all found that the accident was not caused by that error, but by the negligent navigation of the pilot, there could be no recovery. This Court has squarely held, in the *Malcolm Baxter, Jr.*, 277 U. S. 323, that unseaworthiness does not make a vessel liable for cargo damage unless the unseaworthiness caused the damage.

To put the matter in another way, so long as the requirement of the Harter Act was satisfied at the loading port, the immunities of the Harter Act applied to the voyage. Assuming that the respondents' servants at Bremen made an error and that, because of "owner's intervention" the consequences of the error were not within the cover of the Harter Act, still the protection of the Harter Act was lost *only quoad that error;* and, since that error had nothing to do with the accident, the whole question becomes academic. The accident was due to negligent navigation on the part of the pilot,

and the Harter Act certainly covers that. Whether it covers acts of the owner which did not cause the disaster makes no difference whatever.

V.

The petition for a writ of certiorari should be denied.

Dated, New York, June 5, 1933.

HAIGHT, SMITH, GRIFFIN & DEMING,
Proctors for Respondents,
27 William Street,
New York City.

JOHN W. GRIFFIN,
WHARTON POOR,
of Counsel.